

EHAMBARAM NARAYANAN & ANOR.

v.

CONSOLIDATED PLANTATIONS BHD. & ORS.

HIGH COURT MALAYA, MELAKA

WAN YAHYA J

[ORIGINATING SUMMONS NO. 99 OF 1984]

28 FEBRUARY 1992

LABOUR LAW: *Employment - Whether special relief allowance (SRA) paid to the employee of the 1st defendant is in fact wages as defined in the EPF Act 1951 (Revised 1982) - Whether the present claim arises out of contractual terms entered between the plaintiff and the 1st defendant.*

WORDS AND PHRASES: *Defined - “wages”, “together with”, “inclusive” of “in union with”, distinction between “and” and “together with” - Re Joe 1 [1943] 1 Ch. 311 “together with” - Whether should be construed literally and be given its plain and ordinary meaning within the context of that definition - Section 2 of the EPF Act 1951.*

The special relief allowance (SRA) proviso which was expressly stated to be a temporary allowance not subject to income tax or EPF contribution, however, had given rise to the present controversy as to whether the private sector employee who had followed suit in answer to the Government call, would have to pay EPF in respect of these allowances.

Hence the plaintiff herein has sought for SRA paid to the employee of the first defendant is in fact wages as defined in the EPF Act 1951 (Revised 1982).

The plaintiff’s argument put forward in support of their claim is also based on a two pronged approach.

The first prong is that SRA would attract EPF contributions by operation of law. Secondly they say that the SRA by the employer was contractual and non - discretionary in nature and would therefore attract EPF contributions.

Held:

[1] The view of the second approach appears to be a correct one in view of the Supreme Court case of *Petaling Rubber Estate Ltd. v. Nadarajah* [1988] 1 MLJ 22. It is therefore for the plaintiff to show that the SRA in the present case, arises out of the contractual terms entered into between the plaintiff and the 1st defendant.

[2] On the balance of evidence produced before the Court, the learned Judge held that the plaintiff had failed to prove that the SRA was contractual and non - discretionary.

[3] Unfortunately in none of these cases the Court had the opportunity to define the meaning of the conjoining limb to the definition of “wages”. This Court is of the view that, the term “together with” should be construed literally and be given its plain and ordinary meaning within the context of that definition to read as “inclusive of” or “in union with”.

[4] This Court is of the view that “wages” under the EPF Act is not confined to the remuneration due to the employee under his contract of service in circumstances specified under paras. (a), (b) and (c) of that definition only, but will include any other allowance payable in respect of high cost of living.

a [5] It is immaterial in what name one calls it - SRA or COLA but so long as it can be taken explicitly or impliedly as an allowance paid by the employer to relieve the employee of the high cost of living, it will fall within the definition of wages.

[6] It must be observed that this supplemental or conjoining limb to include other allowance for high cost of living is not to be found in the definition of 'wages' in the Employment Act.

b [7] The learned Judge held that SRA is nevertheless caught by the definition of wages in s. 2 of the EPF Act as the primary purpose of such allowance is undeniably related to the high cost of living allowance.

[Judgment for the plaintiffs in respect of prayers 1, 2 & 4 of the originating summons.]

c Cases referred to:

Petaling Rubber Estate Ltd. & Anor. v. Nadarajah & 164 Ors. [1988] 1 MLJ 22 (dist)

Asia Motor Company (KL) Sdn. Bhd. v. Ram Raj & Anor. [1985] 2 MLJ 202 (dist)

P.A. Pereira & Anor. v. Hotel Jayapuri Bhd. & Anor. [1986] 2 MLJ 1 (dist)

Rogerson v. Joel [1943] 1 Ch 311 (cons)

Legislation referred to:

d EPF Act 1951 (Revised 1982), s. 2

For the plaintiffs - B. Lobo; M/s. Lobo & Associates

For the 1st & 3rd defendants - Wilfred Abraham; M/s. Shearn Delamore & Co.

For the 2nd defendant - Prasad Abraham; M/s. Abraham & Partners

JUDGMENT

e Wan Yahya J:

On 20 October 1973 our late Prime Minister Tun Abdul Razak issued a statement about the Government's decision to implement a two pronged strategy to help Malaysians of the lower income group. The first prong which was meant for Government employees was in the form of a special relief allowance (SRA) varying from RM15 to maximum of RM30 per month. While the second prong was made up of package programme of relief measures in numerous forms such as the lifting of tariffs and reduction of duty on imports, Government subsidies establishment of fair price shops and many other similar measures.

f The SRA proviso which was expressly stated to be a temporary allowance not subject to income tax or EPF contribution, however, had given rise to the present controversy as to whether the private sector employee who had followed suit in answer to the Government's call, would have to pay EPF in respect of these allowances. Hence the plaintiff herein has sought for a determination in this Court that the SRA paid to the employee of the 1st defendant is in fact wages as defined in the EPF Act 1951 (Revised 1982).

g The plaintiffs's argument in support of their claim is also based on a two pronged approach. The first prong is that SRA would attract EPF contribution by operation of law. Secondly they say that the SRA by the employer was contractual and non discretionary in nature and would therefore attract EPF contributions.

h The view on the second approach appears to be a correct one in view of the Supreme Court case of *Petaling Rubber Estate Ltd. v. Nadarajah* [1988] 1 MLJ 22 at p. 24 wherein Hashim Yeop A Sani SCJ (as he then was) said:

i Employers pay SRA in various ways. Some may pay SRA because payment of SRA is incorporated in a collective agreement. Some may pay SRA voluntarily and some after

negotiations. Each case has to be determined on its own facts to see whether the SRA payable retains its original character or changes to something else. In its true and original concept SRA is a temporary allowance payable over and above the wages of the employees. Unless there is evidence to show that parties have contracted otherwise SRA cannot be regarded as part of wages.

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It is therefore for the plaintiff to show that the SRA in the present case, arises out of the contractual terms entered into between the plaintiff and the 1st defendant. Various correspondence as well as the collective agreement have been produced in Court. My impression after reading them is that there was no such intention between the parties to treat SRA as wages. In the circular attached to the agreement, I can find no specific terms stating that SRA would be taken into consideration when deciding wages. On the other hand, the letter from MAPA dated 9 December 1974 made it clear that the SRA payments were temporary relief that could be withdrawn at any time. In the collective agreement there was a specific clause to indicate that SRA would not form part of wages. Besides all these points, one must not lose sight of the fact that SRA proposed by the late Tun Razak was intended to be a purely temporary relief which did not attract income tax or EPF contribution. The late Prime Minister had expressed the hope that the private sector would follow the Government and this was exactly what the 1st defendant did that is to adopt the Government's gesture by providing temporary relief allowance to alleviate financial difficulties of their lower income workers on the same terms as the Government officers - free from income tax and EPF contributions.

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On the balance of evidence produced before me, I would hold that the plaintiff had failed to prove that the SRA was contractual and non discretionary.

Reverting to the first prong of the plaintiff's argument, it was contended that SRA being an allowance to alleviate financial hardship, is in fact the cost of living allowance and any allowance paid in respect of high cost of living, by whatever name called, is to be treated as wages under the EPF Act 1951.

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Wages is defined under s. 2 of the 1951 Act as follows:

Wages means the remuneration in money, other than a service charge, due to an employee under his contract of service or apprenticeship, whether agreed to be paid monthly, weekly, daily or otherwise:

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- (a) in respect of the normal periods of work to be performed by the employee;
- (b) where payment is calculated in relation to a set task or tasks, in respect of the number of tasks completed by the employee; or
- (c) where payment is calculated in relation to the volume of work done, in respect of the work completed by the employee,

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together with **any allowance** payable by the employer to the employee in respect, either explicitly or impliedly, of high cost of living;
(Emphasis added)

Several authorities have been cited by Counsels for both parties but none of these are on all fours with the present issue.

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Asia Motor Co. (K.L.) Sdn. Bhd. v. Ram Raj & Anor, [1985] 2 MLJ 202 relates to the meaning of remuneration and wages in the Wages Council Act 1974 and Employment Act 1955.

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a *Petaling Rubber Estate Ltd. & Anor. v. Nadarajah & 164 Ors. (supra)* deals with the meaning of wages within the Employment Act 1955 and in particular whether overtime comes within the definition of that Act.

b *P.A. Pereira & Anor. v. Hotel Jayapuri Bhd. & Anor.* [1986] 2 MLJ 1 is in spite of its interpretation on wages within the meaning of the EPF Act is more in tune with the application of service charges in relation to the term wages.

Unfortunately in none of these cases the Court had the opportunity to define the meaning of the conjoining limb to the definition of ‘wages’.

c To my mind, the term ‘together with’ should be construed literally and be given its plain and ordinary meaning within the context of that definition to read as ‘inclusive of’ or ‘in union with’. In *Re Joel, Rogerson v. Joel* [1943] 1 Ch 311 it was held that a gift of a house together with its contents did not constitute two separate gifts but is a single gift. In the course of the judgment at 315, Lord Greene commented that the word ‘and’ is weaker than ‘together with’ in the following words:

d On the second question Farwell J was in error in deciding that a bequest of a leasehold house “together with the contents” constituted two separate gifts. He so held on the authority of *In re Lysons*, but it is contended that case was wrongly decided. This was a gift of onerous and profitable property aggregated in one gift. For this purpose there are no stronger words than “together with”. Joyce J in *In re Lysons* thought there was a single gift but felt bound by *Syer v. Gladstone* and *In re Hotchkys*. *Syer v. Gladstone* is distinguishable, for “and” is far weaker than “together with,” which goes further to show an intention to aggregate.

e I am of the view that ‘wages’ under the EPF Act is not confined to the remuneration due to the employee under his contract of service in circumstance specified under paras. (a), (b) & (c) of that definition only, but will include any other allowance payable in respect of high cost of living. It is immaterial in what name one calls it - SRA or COLA but so long as it can be taken explicitly or impliedly as an allowance paid by the employer to relieve the employee of the high cost of living, it will fall within the definition of wages. It must be observed that this supplemental or conjoining limb to include other allowance for high cost of living is not to be found in the definition of ‘wages’ in the Employment Act as discussed in the earlier cited cases which are clearly distinguishable from the present case.

f For the reasons abovementioned I would hold that although the initial intention and policy of our late Prime Minister was to make SRA a temporary allowance and not to be treated as wages, it is nevertheless caught by the definition of wages in s. 2 of the EPF Act as the primary purpose of such allowance is undeniably related to the high cost of living allowance.

g To my mind, the statement made by the Prime Minister relating to a government policy decision could not be construed as intended to override statutory power or legal consideration.

There shall be judgment for the plaintiffs in respect of prayers 1, 2 & 4 of this originating summons.

h Also found at [1992] 2 CLJ 1002

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